In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 124

ALLEN SMILEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 288-295) is reported at 181 F. 2d 505.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1950 (R. 296). Petitioner's petition for rehearing was denied on May 11, 1950, and the Government's petition for rehearing was denied on May 22, 1950 (R. 297). The petition for a

writ of certiorari was filed on June 9, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was a fatal variance between the allegations of the indictment and the proof in respect of the person to whom the false representation of citizenship was made.

2. Whether the court below was correct in holding that an alien's affirmative representation that he was a United States citizen, made in response to a question by a deputy sheriff in accordance with the administrative requirements of the sheriff's office while the alien was being booked on a gambling charge, constituted a false representation of citizenship within the meaning of Section 346(a)(18) of the Nationality Act of 1940.

STATUTE INVOLVED

Section 346 of the Nationality Act of 1940 (54 Stat. 1137, 1163, 8 U. S. C. 746) provided in pertinent part at the time of the offense involved here:

> Sec. 346. (a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—
>
> * * * * *
>
> (18) Knowingly to falsely represent himself to be a citizen of the United States with-

out having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.[1]

* * * * *

(d) Any person violating any provision of subsection (a) of this section shall be fined not more than $5,000, or imprisoned not more than five years, or both.

* * * * *

STATEMENT

Counts one and three of a four-count indictment (No. 20069) and another indictment in one count (No. 20604), filed in the United States District Court for the Southern District of California, charged petitioner with knowingly, wilfully, falsely, and fraudulently representing himself to be a United States citizen to an employee of the Beverly Hills Police Department on June 21, 1947, to J. E. Siu, a Los Angeles County Deputy Sheriff on May 25, 1944, and to the Los Angeles City Police Department on November 1, 1945, each allegedly having a good reason to inquire as to petitioner's nationality (R. 2-3, 11).[2] Petitioner was convicted on each of these charges after a jury

[1] This provision is now embodied in Section 911 of the 1948 revision of Title 18, U.S.C.: "Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both."

[2] Count 2 of indictment No. 20069 charged the same offense as indictment No. 20604 and was dismissed on the Government's motion at the end of the trial (R. 213, 267). Count 4 of the former indictment was a perjury charge and was dismissed on petitioner's motion prior to trial (R. 2, 6, 10).

trial (R. 247-248), and he was sentenced to one year's imprisonment and fined $1,000 on each count, the imprisonment terms to run concurrently (R. 38-41). The Court of Appeals for the Ninth Circuit sustained the judgment as to count three of indictment No. 20069, but reversed the judgment as to the other two counts, holding that the evidence was not sufficient to prove that petitioner had affirmatively represented himself to be a United States citizen (R. 296, 289-290).

The evidence in respect of count three of indictment No. 20069 may be summarized as follows:

Petitioner was arrested on May 25, 1944, by deputies of the Los Angeles County Sheriff's Office on a gambling (bookmaking) charge (R. 80, 86, 88). Before he was taken to the county jail (R. 85-88), one of the arresting officers, Jacob E. Siu, made out an arrest slip (Ex. 4, R. 91) on the basis of petitioner's answers to Siu's questions. The slip recited, among other things, that petitioner was 37 years of age, that he was born in New York, and that he had lived in the United States all his life (R. 82-83). After petitioner was taken to the county jail, a booking form (Ex. 5, R. 136) was filled out by another deputy sheriff, Milton S. Hopkins, as part of the procedure (R. 83, 121) required by the regulations of the sheriff's office (R. 93, 133, 135). The top part of Exhibit 5, which was followed by Siu's signature, contained some of the same information as was contained in Exhibit 4

(R. 84). The lower part of Exhibit 5 consisted of a series of printed questions, which were orally propounded to petitioner by Hopkins, and petitioner's answers thereto as typed by Hopkins. The questions (in italics) and answers (in quotation marks) included the following: *Birthplace City State* "New York, N. Y."; *Age* "37"; *Lived in City County State* "17 years"; *U. S. Citizen* "Yes." (R. 121-123, 128.) Although Hopkins stated that Siu left after the first part of Exhibit 5 was prepared (R. 122), Siu stated that he had custody of petitioner while the lower part of the exhibit was being prepared and that he (Siu) did not sign the exhibit until it was fully completed (R. 84, 90). Siu was positive in his testimony, giving as his reason the fact that a well-known individual was arrested at the same time (R. 88).

Richard B. Hood, special agent in charge of the Los Angeles office of the Federal Bureau of Investigation, testified that information obtained from fingerprint cards furnished the Bureau by law enforcement agencies may be employed in the preparation of identification orders; that such information may be made available to other law enforcement agencies, or may be used by the Bureau itself in the apprehension of fugitives; that information as to a fugitive's nationality may be of tremendous value to an investigating officer; that information in the files of the Bureau is made available to the Immigration and Naturalization Serv-

ice; and that the Bureau notifies the Service when an alien is sentenced for a crime (R. 137-140).

ARGUMENT

1. Petitioner raises for the first time in this Court (Pet. 13) the contention that there was a fatal variance between the allegations of count 3 of indictment No. 20069 and the proof as to the officer to whom the misrepresentation of citizenship was made (Pet. 13-14). However, this Court has repeatedly said that questions not raised below will not be considered here. *Luria* v. *United States,* 231 U.S. 9, 17; *Duignan* v. *United States,* 274 U.S. 195, 200; *Husty* v. *United States,* 282 U.S. 694, 701-702; *Becker Co.* v. *Cummings,* 296 U.S. 74, 80; *Sonzinsky* v. *United States,* 300 U.S. 506, 514.

In any event, if the jury believed Siu's testimony that he did not sign Exhibit 5 until after the form was completed and that he had petitioner in custody until that time, and if the jury disregarded Hopkins' inconsistent testimony, as they had the right to do under the instructions (R. 277-278), it is doubtful that there was a variance in the true sense. But, even if it be assumed that Hopkins' testimony was correct, we think that the variance was immaterial. As a general rule, if an accused was sufficiently informed of the charges to enable him to present his defense without being taken by surprise by the evidence at the trial, and if he will be protected against another prosecution for the same offense, discrepancies between the allegations and the proof are immaterial. *Berger* v. *United*

States, 295 U.S. 78. Petitioner could hardly contend that he was taken by surprise, since his questioning by Siu, one of the arresting officers, and Hopkins, the booking officer, was all part of one transaction. Petitioner in effect admitted to the trial court that he was not surprised, for, in explaining his failure to take the stand, he informed the court (R. 251) that he would have verified the Government's evidence as to the misrepresentations charged. Petitioner will certainly be protected against a second prosecution for the offense charged in count 3, in view of the allegation in the indictment that the misrepresentation was made to Siu at a particular time, the testimony that the offense occurred at that time, and the evidence that the misrepresentation was recorded on the document (Exhibit 5) bearing Siu's signature. Clearly, therefore, the fact that Hopkins, rather than Siu, orally asked the questions resulting in petitioner's misrepresentation was a harmless variance to be disregarded under Rule 52, F.R. Crim. P. Cf. *Bennett* v. *United States,* 227 U.S. 333, 338; *Ferrari* v. *United States,* 169 F. 2d 353 (C.A. 9); *United States* v. *Sprinkle,* 57 F. 2d 968, 969 (C.A. 2).

2. There is no merit in petitioner's argument (Pet. 14-24) that the court below gave undue scope to the provisions of Section 346(a) (18) of the Nationality Act of 1940 and that its decision in this regard is in conflict with decisions of other courts of appeals. The application of Section 346(a)

(18) has been upheld in the following instances of false representation of citizenship: in an employment questionnaire required by an employer from a long-time employee (*United States* v. *Achtner,* 144 F. 2d 49 (C.A. 2)); in response to a question by the chairman of the executive board of a labor union considering whether to investigate charges by its business representative that the defendant had done defective work for a company engaged in defense activities, even though the defendant had not concealed his nationality status from the employer (*United States* v. *Romberg,* 150 F. 2d 116 (C.A. 2)); in applying for a poll tax receipt and a ballot (*Frederick* v. *United States,* 146 F. 2d 488 (C.A. 5), certiorari denied, 324 U.S. 861; *Campa* v. *United States,* 158 F. 2d 643 (C.A. 5), certiorari denied, 330 U.S. 826); in applying for employment (*United States* v. *Tandaric,* 152 F. 2d 3 (C.A. 7), certiorari denied, 327 U.S. 786); in a Selective Service questionnaire and an employment application (*Prevost* v. *United States,* 149 F. 2d 747 (C.A. 9)); and in applications for a liquor license in a State requiring licensees to be citizens and while testifying in support of an application for admission to this country of another alien the witness desired to employ (*De Pratu* v. *United States,* 171 F. 2d 75 (C.A. 9)).

In the leading case of *Achtner, supra,* the Second Circuit held that the statute applies only to a misrepresentation of citizenship "made to a person

having some right to inquire or adequate reason for ascertaining a defendant's citizenship," as distinguished from a misrepresentation made "as a mere boast or jest or to stop the prying of some busybody," and that the word "falsely" implies "something more than a mere untruth and includes 'perfidiously' or 'treacherously,' * * * or 'with intent to defraud' * * *" (144 F. 2d at 52).

While it might be argued that this is an unduly restrictive interpretation, and although there may be some doubt under the decisions as to the permissible scope of the statute's application,[3] it is

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[3] In the *Tandaric* case, *supra*, the Seventh Circuit said that the statute applies to any misrepresentation made with a fraudulent purpose. But the language from the *Achtner* decision, *supra*, which the court quoted as supporting this statement was addressed to the precursor of Section 346(a) (18) in Section 79 of the Criminal Code, 35 Stat. 1088, 1103, which provided: "* * * whoever, for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both." In the *Achtner* case the Second Circuit pointed out that the Nationality Act of 1940 was "a national defense measure enacted in the face of the impending war to help tighten controls over the conduct of aliens in this country" and that "the intent of Congress * * * was quite obviously to extend, rather than to reduce, the coverage, as well as the penalties, of the prior law." 144 F. 2d at 52. In the later *Romberg* case, *supra*, where there was no evidence of a fraudulent purpose, the Second Circuit said, quoting from its *Achtner* decision, that "the sole question * * * is whether the Union's executive board had 'some * * * adequate reason for ascertaining * * * defendant's citizenship' at 'a time of deepening national crisis'." 150 F. 2d 116. In the *Prevost* case, *supra*, the Ninth Circuit held that it is not necessary to show that the misrepresentation was material to the transaction in which it was made and in the *De Pratu* case, *supra*, that a fraudulent purpose is not an element of the offense.

clear that petitioner has no cause to complain that the statute was improperly applied to his misrepresentation. For the court below adopted the most restrictive construction distilled from the prior decisions; it stated the question to be (R. 291):

> Does this [petitioner's] answer constitute a representation falsely and fraudulently made to a person having good reason to inquire into the nationality status of appellant? The allegations of the indictment and the provisions of sub. par. (18) of § 746 (a) require such a degree of proof to sustain the conviction.

We think the Court of Appeals was correct in rejecting petitioner's argument, renewed here (see Pet. 19-20, 24), that the Los Angeles County Sheriff's office was not an agency having adequate reason to inquire as to petitioner's citizenship in booking him upon his arrest on gambling charges.[4] The

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[4] This question was submitted to the jury under the following instruction (R. 273-274):

"The Court instructs you with reference to the allegation in the indictment that the person to whom the alleged false representation of citizenship was made 'had a good reason to inquire into the nationality status of the defendant' that the phrase 'good reason to inquire' means more than any reason, or which might be deemed by such person inquiring to be a good reason; it means as applied to this case that the public officer inquiring had an adequate reason or right in law in furtherance of his official authority and duty to ascertain the defendant's citizenship.

"You are further instructed that even though you find that the defendant made a false representation of citizenship to the persons or any one of the persons named in the indictment, you must nevertheless find the defendant not guilty if you find such representation was made 'as a mere boast' or 'jest' or 'to stop the prying of some busy-body.'"

question was prescribed by a procedure adopted in the sheriff's office, and the testimony of FBI agent Hood shows that information as to citizenship may be of tremendous value to an investigating officer, thus justifying the conclusion of the court below (R. 292) that peace officers deem it helpful to have as much information as possible, including information as to citizenship, in the detection of crime. Very conceivably, information as to an alien's nationality could provide clues as to his haunts, associates, and activities. The initial clause of Section 346(a), *supra,* p. 2, the clear language of paragraph (18) itself, and the decisions cited above preclude petitioner's contention (Pet. 23-24) that the right to question as to citizenship must have been based on some particular form of authority. See particularly, *United States* v. *Achtner,* 144 F. 2d at 52.

Nor is there any merit in petitioner's argument (Pet. 20-22) that there is insufficient basis for a conclusion that he had a fraudulent purpose. The record shows that the Immigration and Naturalization Service had petitioner under investigation for several years before deportation proceedings were formally instituted in 1945 (R. 153-157). His own statement (Pet. 21) indicates that he was aware of this investigation and thus shows a purpose to conceal his status at the time of the arrest. Furthermore, the record also shows that petitioner did not register as required by Section 31(a) of the Alien Registration Act of 1940 (54 Stat. 670,

673-674, 8 U.S.C. 452(a)) [5] until October 1945 (R. 153-156; Ex. 2, R. 69-70, 152). Under Section 36 (a) of that Act (54 Stat. 675, 8 U.S.C. 457), wilful failure to comply with the requirement of Section 31(a) is a crime and it is reasonable to infer that petitioner was aware of this requirement when he misrepresented his citizenship to the Sheriff's office. The fact that there was no evidence that the Sheriff's office made its arrest data available to federal agencies (see Pet. 20) is immaterial, for the jury could reasonably have inferred that petitioner had his failure to register in mind when he misrepresented that he was a citizen.[6]

The trial court instructed the jury that before they could convict they must find "that the person inquiring concerning the nationality status of defendant was engaged in an inquiry concerning a matter which made the nationality status of the defendant relevant and material to the matter under consideration" (R. 275). Petitioner argues

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[5] Section 31(a) provides: "It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 30, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days."

[6] The trial court instructed the jury, *inter alia* (R. 275):

"Before you may convict the defendant you must further find beyond a reasonable doubt that such representation was not only knowingly false and due to willfulness, but was made for a fraudulent purpose.

"As applied to this case, 'fraudulent purpose' means that such representation was not only knowingly false and due to willfulness, but was made with intent to deceive such persons as to a material matter."

that materiality in this sense is a necessary element of the offense and that his false representation was not pertinent to the subject matter of his arrest on a gambling charge (Pet. 18-20, 22-24). None of the appellate decisions construing the statute supports his contention and the Ninth Circuit in the *Prevost* case (149 F. 2d at 748) and the instant case (R. 294) expressly refused to engraft this additional limitation upon the scope of the statute. See also *United States* v. *Achtner,* 144 F. 2d at 52; *United States* v. *Tandaric,* 152 F. 2d at 5. The trial court's instruction was therefore more favorable to petitioner than was warranted under the applicable decisions. And so far as materiality to the transaction in which the misrepresentation was made is concerned, the Court of Appeals correctly pointed out that the question as to citizenship was "material in an over-all system for the proper functioning of such an important office as that of sheriff of Los Angeles County" (R. 292).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Respondent.

REPLY BRIEF OF PETITIONER ALLEN SMILEY.

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REPLY BRIEF OF PETITIONER ALLEN SMILEY.

In reply to the Government's Brief, the issues presented by the Opening Brief of the Petitioner will be discussed in the same order followed in the Opening Brief with a notation as to the place of the Opening Brief in which the issues were discussed, together with a notation to the page in the Government's Brief in Opposition in which the issues were discussed.

I.

There Was a Denial of Due Process as Well as a Denial of Petitioner's Rights Under Article V of the Amendments to the Constitution.

This point is discussed at pages 6-7 of the Government's Brief in Opposition, and is discussed in our Opening Brief at pages 13-14.

The Government's Answer is premised upon a wholly untrue set of facts; by singling out from context one question and answer the Government has been drawn into

a complete misconception as to the actual facts disclosed by the record. At page 5 of the Government's Brief it is incorrectly stated that Siu (the person to whom it is alleged a false claim of United States citizenship was made) had custody of the Petitioner while the "lower part of Exhibit 5 was being prepared, and that he (Siu) did not sign the Exhibit until it was fully completed. [R. 84, 90.]"
This is not a fact.

What counsel has done is take out of context a single question and answer:

> "Q. As to the part below your signature, did you have anything to do with that? A. No, I didn't make that out.
>
> Q. Was it made out at the time that the prisoner was in your custody? A. Yes, it was." [Rep. Tr. p. 84.]

This last question and answer related to the upper portion of Exhibit 5 signed by Siu and this upper portion comported with the information he had previously obtained from the Petitioner at another place and which he at that time and place entered on the arrest or booking slip, Exhibit 4. The question of custody related solely to that period of time when the arresting officer was turning the custody of the prisoner over to the County Jail booking officer, the procedure being that the name, address and charge must first be given by the arresting officer to the jail booking officer and then that portion of the form is [Exhibit 5] signed by the arresting officer. When this has been done there is a transference of custody of the prisoner to the jail booking agency and then that agency, on its own accord, proceeds with filling out the remainder of Exhibit 5.

At page 82 of the record, Siu testifies concerning Exhibit 4. In fact, he has Exhibit 4 in his hand at the time. He then is given Exhibit 5 [R. 83]. The District Attorney is intent upon establishing through him that Exhibit 5 is part of the booking procedure and an official part of the Sheriff's records. He inquires:

"Q. Now, there is Exhibit 5 before you. Is that Exhibit 5 part of the booking procedure record? . . .

The Witness: This was made out in the County Jail.

Q. Well, the question is, is it part of the booking record of Mr. Smiley on the occasion of that same arrest? A. Yes, it is.

Q. Do you recognize it as an official document of the Sheriff's department kept by it in the regular course of business? A. Yes.

Q. Do you know Mr. Siu? A. I signed this booking.

Q. You signed it? A. Yes.

Q. And is it a record that is required to be kept in conection with the booking of a prisoner under the circumstances that prevailed when Mr. Smiley was booked? A. Yes, it is kept by the County Jail booking office.

Q. Did Mr. Smiley give you the answers to any of the questions that appear on Exhibit 5, for identification? A. Well, the top part of this, where my signature is, is the same information that is on the arrest slip.

Q. As to the part below your signature, did you have anything to do with that? A. No, I didn't make that out.

Q. Was it made out at the time that the prisoner was in your custody? A. Yes, it was.

Q. Was it part of the same booking transaction? A. Yes, it was.

Q. Do you know who made it out? A. The clerk up in the County Jail. I don't know his name.

Q. Did the defendant Smiley give the information? A. No. He took it off the arrest slip." [R. 83, 84.]

Having been present at the trial, we know that the question: "Q. Was it made out at the time that the prisoner was in your custody? A. Yes, it was," related to the upper portion of Exhibit 5 which was signed by Siu. This, we think, is likewise quite apparent, from the succeeding questions, establishing that the upper portion was a part of the booking transaction, and that the upper part was made out by the County Jail booking officer and that the defendant Smiley did not give the information but that it was taken from the arrest slip, Exhibit 4.

Siu does not state that he was present when the questions and answers were given to the lower portion. In fact, if he were present, and the Petitioner was in his custody he would have heard the pertinent questions and answers given relating to citizenship. He would have been a part of the interviewing and conversations taking place at that time. The next question following the one: "Q. Did the defendant Smiley give the information? A. No. He (booking officer) took it off the arrest slip," was this: "Q. Did you have any other conversation with the defendant Smiley in the course of either the arrest or the transit to the jail, or your interviews with him in connection with the alleged offense, concerning his citizenship? A. No other conversation other than what I asked him when I made out the arrest slip." [R. 84, 85.]

There is no conflict of testimony between Siu and Hopkins. Their testimony is entirely consistent and establishes a fundamental practice and procedure on the part of the Sheriff's office that the arresting officer delivers the prisoner to the County Jail booking office at which time the upper portion of the form, Exhibit 5, containing name, age, birth, residence and charge is filled out, either from information given by the arresting officer or from the arrest or preliminary booking form, Exhibit 4; this portion of Exhibit 5 is then signed by the arresting officer and completes the transference of the custody of the prisoner to the booking officer at the County Jail. There are no further duties to be performed by the arresting officer.

Hopkins testified in response to the questions by the District Attorney [R. 121]:

> "Q. What did you do when you took some part in the booking of that prisoner at that time? A. The first thing when he was brought in, I filled out the upper part of the booking slip so that the arresting officer could put on his signature, and then he could go.
>
> Q. Did Mr. Siu bring the prisoner to you? A. Yes, sir, he did.
>
> Q. And then, after you had filled in the first part of the booking record, Mr. Siu went away, is that your testimony? A. Yes, sir.
>
> Q. After that did you talk to the prisoner? A. Yes, sir, when we started booking them, I booked this prisoner."

On cross-examination, Hopkins further testified [R. 129]:

> "Q. (Referring to Exhibit 4.) Is it familiar to you because of the fact it is the practice of the arresting officer when he brings the prisoner in to then hand you this preliminary arrest booking slip that he has made? A. Yes, sir, he does.
>
> Q. And so as a matter of practice you will then say that you saw this at the time Mr. Siegel and Mr. Smiley were before you? A. In that part I just merely take—have the charge to sign up—sign up for the charge and let the officer go."

It is obvious that the Government's statement, "Siu stated that he had custody of Petitioner while the lower part of the exhibit was being prepared and that he did not sign the Exhibit until it was fully completed," is wholly unsupported by the record. *Siu at no place in the record testified that he did not sign the record until it was fully completed.*

At page 5, immediately following the foregoing statement concerning Siu's testimony, the Government states: "Siu was positive in his testimony, giving as his reason the fact that a well-known individual was arrested at the same time. [R. 88.]" There is no foundation at all for this claim. The examination at this page [R. 88], testing Siu's recollection, was as follows:

> "Q. And had you known Mr. Smiley before? A. No. Never saw him in my life.
>
> Q. This was back in 1944? A. Yes.
>
> Q. You book a great many people, don't you, during the course of a year? A. That is right.

Q. Do you remember booking anyone else on this particular day? A. Benjamin Siegel.

Q. Aside from him whom else did you book? A. No others.

Q. And your recollection feeds back, does it, to that time, that is, that it was this Mr. Smiley that you asked questions of, is that right? A. Yes, sir.

Q. Do you know who you booked the next day? A. No, I don't."

We reiterate that the record in this case establishes unequivocably (and which we have in detail set forth on pages 2 and 3 of our Petition) that the affirmative answer to the question of United States citizenship was made to Hopkins outside of the presence of Siu.

For answer to our argument on this point, the Government states: (a) that the question was not raised below; and (b) that it was a harmless variance.

(a) It is fundamental that conviction "upon a charge not made would be sheer denial of due process." Such being the case, the question, even though raised for the first time, is a fundamental one, and will be noticed and acted upon by this Court (Opening Brief p. 13).

We contend, however, that our specification of error that the evidence was insufficient to establish the offense charged [R. 44, 162, 204], raised the question that proof of false representation of citizenship to a person other than the one named in the indictment as the one to whom it was made and at a different time and place amounts to a complete failure of proof and deprives Petitioner of due process because he stands convicted of a charge not made. Also, our specification of error IX [R. 45] raises the question of the Court's jurisdiction to

impose judgment and points up the proposition of Petitioner's rights under article V of the Amendments to the Constitution as well as article VI thereof.

The Government fails to distinguish—and for that matter even refer to—the applicable cases cited by us: *Mahler v. Eby,* 264 U. S. 32, 68 L. Ed. 549; and *Silbach v. Wilson & Co.,* 312 U. S. 1, 16. They content themselves with what we consider wholly inapplicable cases. They are as follows:

In the case of *Luria v. United States,* 231 U. S. 9, the sufficiency of a petition to cancel a naturalization certificate was not challenged and the case was heard and determined as if the issue of fraud were tendered. In the opinion rendered by the District Court, it was said, after observing that the petition was subject to criticism: "That point, however, was not raised and I suppose the defendant does not mean to raise it." Of this situation, this Court said: "This view of his attitude passed unquestioned then and it is too late to question it now."

In the case of *Duignan v. United States,* 274 U. S. 195, 200, this Court had before it an appeal from a decree of the Court of Appeals affirming a decree of the District Court forfeiting a lease for violation of the National Prohibition Act. The enumerated questions raised and presented in the Court of Appeals did not include the question of the constitutionality of the forfeiture under Section 23. This Court held that constitutional objections to the forfeiture in equity of the lease under provisions of Section 23 of the National Prohibition Act for violation of the Act by the tenant cannot be raised for the first time in the Supreme Court.

The case of *Husty v. United States,* 282 U. S. 694, 701, 702, involved the question of raising in this Court for the

first time the exclusion by the trial court of certain questions by the petitioner there seeking to establish the name and identity of an officer's informant. This Court said:

> "Petitioners ask review of these rulings on the evidence, but we do not consider them, since they were not assigned as error on the appeal to the Court of Appeals, and it does not appear that they were presented or passed upon there."

The case of *Becker Co. v. Cummings,* 296 U. S. 74, 82, reversed a judgment of the Court of Appeals affirming an order of the District Court granting a Motion to Dismiss, for want of jurisdiction, a suit brought under the Trading With the Enemy Act, against the Alien Property Custodian and the Treasurer of the United States, to recover a balance of the proceeds of sale of certain shares of stock seized and sold by the Alien Property Custodian. In the course of its opinion, this Court commented:

> "In the present state of the record, it is unnecessary to inquire whether the effect of the act is to sanction in every case the sale of the property of a non-enemy giving him recourse only to the proceeds of sale . . . that question was not raised or considered below. The issue now presented is much narrower. . . ."

The case of *Sonzinsky v. United States,* 300 U. S. 506, 514, merely contains a recitation of the abstraction:

> "We do not discuss petitioner's contentions which he failed to assign as error below."

(b) The Government argues that the defendant was not taken by surprise and protected against another prosecution for the same offense; and, therefore, it was a simple

discrepancy between the allegations and the proof and immaterial (Govt. Br. p. 6). This, to say the least, is an extreme over-simplification of the question posed. The statute, U. S. C., Title 8, Sec. 746(a) 18 makes it an offense to: "Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized. . . ." The indictment here specifically charged that on or about May 25, 1944, the Petitioner knowingly, wilfully, falsely and fraudulently represented "to J. E. Siu, a Deputy Sheriff of the County of Los Angeles, State of California, said J. E. Siu being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States."

The Court instructed the jury [R. 273]:

> "You are instructed that under the charge in each count of this indictment that the burden is on the prosecution to establish beyond a reasonable doubt each of the following elements:
>
> 1. . . .
>
> 2. **That he made the representation to the person mentioned in the indictment.**
>
> 3. . . .
>
> 4. That the defendant willfully made such false representation.
>
> 5. . . .
>
> 6. That the person to whom such representation was made had a good reason to inquire into the nationality status of the defendant."

Each false representation of United States citizenship is itself an offense. The Petitioner would have violated the statute twice if at his interrogation at the Hill Street address he had there affirmatively claimed to be a United States citizen, or if the arrest slip that Siu made out at the Hill Street address contained the question, "Are you a citizen of the United States?" and the petitioner had answered, "Yes."

We are dealing here with a distinct substantive offense and not a continuing offense. A charge of the substantive offense that "A" murdered "B" at a certain time and place cannot be established by proof he murdered "C" at that time and place. Let us assume that the jury had acquitted the Petitioner for falsely representing himself to be a citizen of the United States to Siu, and the United States indicted him for having made false representation of United States citizenship to Hopkins. The Petitioner would be in no position to plead twice in jeopardy because they are two separate and distinct offenses. In fact, to point up the speciousness of the Government's argument that Petitioner would be protected against a second prosecution for the offense charged in Count Three, we only have to refer to the Government's so-called conditional Petition for Certiorari. The Government seeks review of Count One [R. 2] of the indictment which charged false representation of citizenship to one Cox of the Beverly Hills Police Department (Govt. Pet. No. 213, p. 8). The evidence as to that count was substantially the same as the Siu testimony [R. 82, 118]. In both instances the Petitioner's age was given, the years lived in the County, the years lived in the State and the years lived in the United States was given as life.

Neither could the Government join in one and the same count of an indictment the false representations of citizenship separately made to Siu and Hopkins. It would be an improper joinder.

Kotteakos v. U. S., 328 U. S. 748, 774.

The Government cites three cases as supporting their contention that proof that the false representation was made to Hopkins was a harmless variance. These cases are wholly inapplicable and deal with entirely different situations:

The case of *Bennett v. United States*, 227 U. S. 333, 338, reviewed a conviction for violation of the White Slave Act. The defendant was charged in one count of the indictment in the United States District Court of Ohio for having caused the transportation of one Opal Clark. The testimony disclosed that the woman transported had gone by the names of Opal and Nellie and that her true name was Jeanette LaPlante. This Court held that the variance was not fatal inasmuch as the record shows that the defendant was informed of the charge against her and the record is in such shape as to protect her against another prosecution for the same offense. A further point of variance was urged as to the second count on the ground that it alleged that the tickets were procured at Chicago, Illinois, whereas the testimony showed that they were purchased in Cincinnati. The testimony disclosed that the tickets were purchased in Cincinnati and then sent to Chicago where the women transported got them and used them for the transportation from there. This Court said, "It is not possible to imagine that the variance caused any prejudice. . . ." A third variance was asserted in that the indictment charged that the transportation of two women

and the proof was of the transportation of one. This Court said, "How what the defendant did not do can be considered material description of what she did do is not easy to imagine."

The case of *United States v. Sprinkle,* 57 F. 2d 968, 969 (C. A. 2) was a mail fraud case. There were two claims of variance; the first that testimony of false representations other than those charged in the indictment was received. The Court of Appeals held that:

> "False statements outside scheme charged are competent to show the defendant's fraudulent intent. If such false statements were part of the fraudulent scheme charged they should have been alleged as such in the indictment and proof of them without such allegations constitute a variance . . . this is clearly not such a case."

The second claim of variance was directed at the proof of mailing of the indictment letters; of this claim, the Court said:

> "It would suffice to say that proof of count six is sufficient to sustain the conviction without regard to questions of variance as to the other counts."

In the case of *Ferrari v. United States,* 169 F. 2d 353 (C. A. 9), the defendant was convicted of fraudulently concealing and facilitating the concealing of heroin, which defendant knew had been imported into the United States contrary to law. The Court held that although the indictment charged the defendant with receiving the heroin from one person and proof established another

person to be the one associated with him in concealment of the drug, variance was not fatal. The man named in the indictment as being present with appellant at the time the offense was alleged to have been committed and the other man that the evidence disclosed was there with appellant, were both present at the trial and each testified on appellant's behalf. The substantive offense in this case was not with whom he dealt but the illegal use and concealment of the drug at a specific time and place. Obviously, in the absence of surprise, the defendant could not have been effected by the variance.

In the instant case we have the precise situation of one convicted on a charge not made. The cases set forth at page 13 of our Petition and Brief, hold that a conviction upon a charge not made is sheer denial of due process.

The Government has failed to make any answer to our further position that the trial of a defendant on a charge different from that found by grand jury is violative of the Fifth Amendment to the Constitution, and that a conviction "on charge other than as made by grand jury presentment is jurisdictional and therefore void." (See cases cited our Petition and Brief, p. 14.)

We add that proof of a distinct and separate false representation of citizenship from the one charged, as here, does violence to the Sixth Amendment requirement that "in all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."

II.

The Decision of the Court of Appeals Is in Direct Conflict With the Decisions of Other Courts of Appeal Upon the Same Questions: Also, the Court of Appeals Has Decided Questions of Substance Relating to the Construction of a Statute of the United States, Which Has Not Been, but Should Be Settled by This Court.

This point is discussed at pages 7-13 of the Government's Brief in Opposition; it is discussed in our Petition and Brief at pages 14-28.

The Government, at page 13 of its Brief in Opposition, states that we argue that the false representation was not pertinent to the matter of his arrest on a gambling charge. Our position is far from being so limited. Of course, the false representation was not pertinent to the matter of his arrest on a gambling charge. Neither was it material to his booking. There is no testimony that Exhibit 5 was used by the Sheriff for any purpose whatsoever. There is only testimony covering the use and purpose of Exhibit 4, but this arrest slip did not contain the citizenship question; and as to this Exhibit the testimony was that it was used by the sheriff's office itself "for identification and the charge that they are booked on." We reiterate that U. S. citizenship has no relevancy or materiality as to any matter under consideration. Arrest of Petitioner for suspicion of bookmaking, and at most, his identity was the pertinent subject matter. Identity, of course, was fully established by age, address, color of hair and eyes, complexion, physical characteristics and fingerprints.

Counsel is entirely in error when he says that none of the appellate decisions construing the statute supports the

contention that claims of United States citizenship must have relevancy to the transaction at hand. The *Prevost* case (149 F. 2d 747 (C. A. 9)) only passed on the contention on motion to dismiss an indictment that it failed to show how and in what manner the representations of false citizenship mentioned therein were material. They held that the Court did not err in denying the Motion to Dismiss. Actually the indictment charged that the false representation of citizenship was made in connection with his selective service questionnaire and in an application for employment. The same Court in the *DePratu* case (171 F. 2d 75 (C. A. 9)) said of appellant's contention that the proof did not "sufficiently show that his claims of United States citizenship were material to the transactions at hand" that:

> "In each instance, the inquiry as to citizenship was made by public officers in furtherance of their official duty and authority. . . . Obviously, appellant's claim of U. S. Citizenship in response to such inquiry could not be said to have been made . . . to 'stop the prying of some busy body.'"

In all of the cases that we have cited, as well as those of the Government, involved the established elements of the right legally to inquire as to citizenship, deception as to material subject matter, and the perpetration of fraud. True, the Circuit Court in the instant case, referring to their opinion in the *DePratu* case said "that the question of citizenship there was material to the transactions at hand and also that the law gave the authority and imposed the affirmative duty on the officers inquiring to ascertain the citizenship status of the defendant in that action," but they were dealing with the facts in that case and that they did not say that less would not suffice [R. 294]. They do

not find that it must not be relevant but, "We hold that where some right to inquire exists or the person inquiring has a good and sufficient reason for learning the citizenship of the person asked, it is sufficient. . . ." [R. 294.] The Court of Appeals, however, further held, and which we say erroneously, that citizenship was "material in an overall system of the Sheriff's office." [R. 290.] There was no evidence, as we have pointed out, of any purpose or reason for asking the question by the Sheriff's office. One might as well conclude that a United States citrus pest inspector in an agricultural area who is making inspections to determine proper practices and procedures for the elimination or control of pests was a person who had such a right to inquire or had sufficient reason for so doing, even though it was collateral to the treatment and control of pests.

The Government cites one case that we failed to cite: *United States v. Romberg,* 150 F. 2d 116 (C. A. 2), and claims that there was no evidence in that case of a fraudulent purpose, and quote "the sole question . . . is whether the Union's executive Board had 'some . . . adequate reason for ascertaining . . . defendant's citizenship' at a 'time of deepening national crisis.'" The second Circuit in this case makes no reference at all to whether the evidence showed or did not show the existence of a fraudulent purpose. The evidence does show, though, that he did conceal his alienage from the Union through whose Joint Employment Committee he received employment with a company which was doing work for the United States Maritime Commission. This would indicate existence of a hiring hall arrangement and that employment came through the Union rather than the employer. The Union, therefore, was directly interested in

the surveillance of its members, whom they had placed on the job, in meeting union standards of competency in doing their work and in the fulfillment of their established policies as to who might be employed on defense work. The defendant was doing electrical work at the dry docks and the business agent of the Union had made a charge to the executive board against the defendant that he had done defective work at the dry docks. The executive board during the consideration of whether it should direct an investigation of the charge, at the request of the business agent asked the defendant whether he was a citizen of the United States, to which the defendant replied, "I am."

III.

As to Government's Cross-Petition for a Writ of Certiorari.

The Government seeks a review of the reversal of Petitioner Smiley's conviction on Count 1 of Indictment No. 20069 and on the count contained in Indictment No. 20604, if this Court grants the Petition of Mr. Smiley's with reference to the affirmed Count which is the basis of his Petition in case No. 124. The Government asserts at page 7 of its Petition for Certiorari (No. 213): "If the Court should determine that the petition in No. 124 should be denied, this conditional cross-petition, involving the two counts reversed by the court below, need not be considered. It is filed solely to protect the Government's interests in the event that certiorari should be granted in No. 124." To say the least, this is a most astounding declaration. It has been our conception that the invocation of the writ of certiorari was to obtain a determination by this Honorable Court on organic and vital prin-

ciples of law as a direction and guide to the subordinate branches of the Federal judiciary. Qualified petitions are an afront to the basic principles governing the issuance of writs of certiorari.

If the correctness of the decision of the Court of Appeals that (a) an alien's answer "American" to the question of his "nationality" on a booking form filled out in connection with his being held as a material witness, and (b) his answer "yes" to the question whether he was a "citizen" on a booking form filled out in connection with his being booked on a gambling charge, do not constitute false representations of United States citizenship within the meaning of Section 746(a) (18) Title 8, U. S. C., should be determined by this Court in the opinion of the Government, then there is no moral foundation for a qualified conditional Petition suggestive of a bargain with respect to the initial Petition of the Petitioner.

Aside from the question of denial of due process and the denial of Petitioner's rights under article V of the Constitution, the basic and fundamental questions posed, as set forth in Point II, pages 14-24, of our Brief, apply fully and with equal force to the reversed counts; and a decision by this Court on this phase of the case as to the affirmed count would determine all of those questions as to the reversed counts. A determination of correctness of the Court of Appeals decision on the sufficiency of the evidence as to the reversed counts in no wise affects or has any interrelationship with the problems posed on the affirmed count with respect to which the Petitioner seeks a review.

The speciousness of the Government's Petition for Certiorari is also apparent from the statement that their Petition "is filed solely to protect the Government's inter-

est in the event the certiorari should be granted in No. 124," in view of the fact that the only thing to be protected inherent in the Judgment is a thousand dollar fine on each count.

The correctness of the Court of Appeals decision in reversing these two counts may readily be justified—at least for the purposes of this response—with these brief observations: The answer "American" to the word "nationality" in view of the evidence that the petitioner was a Canadian [R. 152, 156], is a true answer; and there was not an affirmative representation of United States citizenship. As to the limited answer "citizen," it does not constitute an affirmative false representation that he was a United States citizen. Birth alone in this country is not an affirmative claim to United States citizenship. Many have been born in the United States and have been repatriated. We believe there is the further exception of children born in the United States to diplomatic representatives of foreign countries. In fact, at one time a nativeborn Indian was not a citizen of the United States. The trial court clearly defined correctly in its instructions to the jury what constitutes a false representation under the Section in question when it instructed, "You are instructed 'to represent oneself' as a citizen, as set forth in the indictment, means to hold oneself forth as, and affirmatively claim to be, a citizen of the United States." [R. 274-5.]

Respectfully submitted,

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Attorney for Petitioner.

JERRY GIESLER and
ROBERT A. NEEB,
Of Counsel.

FILED
SEP 1 1950
CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

October Term, 1950
No. 124.

ALLEN SMILEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER ALLEN SMILEY.

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REPLY BRIEF OF PETITIONER ALLEN SMILEY.

In reply to the Government's Brief, the issues presented by the Opening Brief of the Petitioner will be discussed in the same order followed in the Opening Brief with a notation as to the place of the Opening Brief in which the issues were discussed, together with a notation to the page in the Government's Brief in Opposition in which the issues were discussed.

I.

There Was a Denial of Due Process as Well as a Denial of Petitioner's Rights Under Article V of the Amendments to the Constitution.

This point is discussed at pages 6-7 of the Government's Brief in Opposition, and is discussed in our Opening Brief at pages 13-14.

The Government's Answer is premised upon a wholly untrue set of facts; by singling out from context one question and answer the Government has been drawn into

a complete misconception as to the actual facts disclosed by the record. At page 5 of the Government's Brief it is incorrectly stated that Siu (the person to whom it is alleged a false claim of United States citizenship was made) had custody of the Petitioner while the "lower part of Exhibit 5 was being prepared, and that he (Siu) did not sign the Exhibit until it was fully completed. [R. 84, 90.]"
This is not a fact.

What counsel has done is take out of context a single question and answer:

> "Q. As to the part below your signature, did you have anything to do with that? A. No, I didn't make that out.
>
> Q. Was it made out at the time that the prisoner was in your custody? A. Yes, it was." [Rep. Tr. p. 84.]

This last question and answer related to the upper portion of Exhibit 5 signed by Siu and this upper portion comported with the information he had previously obtained from the Petitioner at another place and which he at that time and place entered on the arrest or booking slip, Exhibit 4. The question of custody related solely to that period of time when the arresting officer was turning the custody of the prisoner over to the County Jail booking officer, the procedure being that the name, address and charge must first be given by the arresting officer to the jail booking officer and then that portion of the form is [Exhibit 5] signed by the arresting officer. When this has been done there is a transference of custody of the prisoner to the jail booking agency and then that agency, on its own accord, proceeds with filling out the remainder of Exhibit 5.

At page 82 of the record, Siu testifies concerning Exhibit 4. In fact, he has Exhibit 4 in his hand at the time. He then is given Exhibit 5 [R. 83]. The District Attorney is intent upon establishing through him that Exhibit 5 is part of the booking procedure and an official part of the Sheriff's records. He inquires:

"Q. Now, there is Exhibit 5 before you. Is that Exhibit 5 part of the booking procedure record? . . .

The Witness: This was made out in the County Jail.

Q. Well, the question is, is it part of the booking record of Mr. Smiley on the occasion of that same arrest? A. Yes, it is.

Q. Do you recognize it as an official document of the Sheriff's department kept by it in the regular course of business? A. Yes.

Q. Do you know Mr. Siu? A. I signed this booking.

Q. You signed it? A. Yes.

Q. And is it a record that is required to be kept in conection with the booking of a prisoner under the circumstances that prevailed when Mr. Smiley was booked? A. Yes, it is kept by the County Jail booking office.

Q. Did Mr. Smiley give you the answers to any of the questions that appear on Exhibit 5, for identification? A. Well, the top part of this, where my signature is, is the same information that is on the arrest slip.

Q. As to the part below your signature, did you have anything to do with that? A. No, I didn't make that out.

Q. Was it made out at the time that the prisoner was in your custody? A. Yes, it was.

Q. Was it part of the same booking transaction? A. Yes, it was.

Q. Do you know who made it out? A. The clerk up in the County Jail. I don't know his name.

Q. Did the defendant Smiley give the information? A. No. He took it off the arrest slip." [R. 83, 84.]

Having been present at the trial, we know that the question: "Q. Was it made out at the time that the prisoner was in your custody? A. Yes, it was," related to the upper portion of Exhibit 5 which was signed by Siu. This, we think, is likewise quite apparent, from the succeeding questions, establishing that the upper portion was a part of the booking transaction, and that the upper part was made out by the County Jail booking officer and that the defendant Smiley did not give the information but that it was taken from the arrest slip, Exhibit 4.

Siu does not state that he was present when the questions and answers were given to the lower portion. In fact, if he were present, and the Petitioner was in his custody he would have heard the pertinent questions and answers given relating to citizenship. He would have been a part of the interviewing and conversations taking place at that time. The next question following the one: "Q. Did the defendant Smiley give the information? A. No. He (booking officer) took it off the arrest slip," was this: "Q. Did you have any other conversation with the defendant Smiley in the course of either the arrest or the transit to the jail, or your interviews with him in connection with the alleged offense, concerning his citizenship? A. No other conversation other than what I asked him when I made out the arrest slip." [R. 84, 85.]

There is no conflict of testimony between Siu and Hopkins. Their testimony is entirely consistent and establishes a fundamental practice and procedure on the part of the Sheriff's office that the arresting officer delivers the prisoner to the County Jail booking office at which time the upper portion of the form, Exhibit 5, containing name, age, birth, residence and charge is filled out, either from information given by the arresting officer or from the arrest or preliminary booking form, Exhibit 4; this portion of Exhibit 5 is then signed by the arresting officer and completes the transference of the custody of the prisoner to the booking officer at the County Jail. There are no further duties to be performed by the arresting officer.

Hopkins testified in response to the questions by the District Attorney [R. 121]:

> "Q. What did you do when you took some part in the booking of that prisoner at that time? A. The first thing when he was brought in, I filled out the upper part of the booking slip so that the arresting officer could put on his signature, and then he could go.
>
> Q. Did Mr. Siu bring the prisoner to you? A. Yes, sir, he did.
>
> Q. And then, after you had filled in the first part of the booking record, Mr. Siu went away, is that your testimony? A. Yes, sir.
>
> Q. After that did you talk to the prisoner? A. Yes, sir, when we started booking them, I booked this prisoner."

On cross-examination, Hopkins further testified [R. 129]:

> "Q. (Referring to Exhibit 4.) Is it familiar to you because of the fact it is the practice of the arresting officer when he brings the prisoner in to then hand you this preliminary arrest booking slip that he has made? A. Yes, sir, he does.
>
> Q. And so as a matter of practice you will then say that you saw this at the time Mr. Siegel and Mr. Smiley were before you? A. In that part I just merely take—have the charge to sign up—sign up for the charge and let the officer go."

It is obvious that the Government's statement, "Siu stated that he had custody of Petitioner while the lower part of the exhibit was being prepared and that he did not sign the Exhibit until it was fully completed," is wholly unsupported by the record. *Siu at no place in the record testified that he did not sign the record until it was fully completed.*

At page 5, immediately following the foregoing statement concerning Siu's testimony, the Government states: "Siu was positive in his testimony, giving as his reason the fact that a well-known individual was arrested at the same time. [R. 88.]" There is no foundation at all for this claim. The examination at this page [R. 88], testing Siu's recollection, was as follows:

> "Q. And had you known Mr. Smiley before? A. No. Never saw him in my life.
>
> Q. This was back in 1944? A. Yes.
>
> Q. You book a great many people, don't you, during the course of a year? A. That is right.

Q. Do you remember booking anyone else on this particular day? A. Benjamin Siegel.

Q. Aside from him whom else did you book? A. No others.

Q. And your recollection feeds back, does it, to that time, that is, that it was this Mr. Smiley that you asked questions of, is that right? A. Yes, sir.

Q. Do you know who you booked the next day? A. No, I don't."

We reiterate that the record in this case establishes unequivocably (and which we have in detail set forth on pages 2 and 3 of our Petition) that the affirmative answer to the question of United States citizenship was made to Hopkins outside of the presence of Siu.

For answer to our argument on this point, the Government states: (a) that the question was not raised below; and (b) that it was a harmless variance.

(a) It is fundamental that conviction "upon a charge not made would be sheer denial of due process." Such being the case, the question, even though raised for the first time, is a fundamental one, and will be noticed and acted upon by this Court (Opening Brief p. 13).

We contend, however, that our specification of error that the evidence was insufficient to establish the offense charged [R. 44, 162, 204], raised the question that proof of false representation of citizenship to a person other than the one named in the indictment as the one to whom it was made and at a different time and place amounts to a complete failure of proof and deprives Petitioner of due process because he stands convicted of a charge not made. Also, our specification of error IX [R. 45] raises the question of the Court's jurisdiction to

impose judgment and points up the proposition of Petitioner's rights under article V of the Amendments to the Constitution as well as article VI thereof.

The Government fails to distinguish—and for that matter even refer to—the applicable cases cited by us: *Mahler v. Eby,* 264 U. S. 32, 68 L. Ed. 549; and *Silbach v. Wilson & Co.,* 312 U. S. 1, 16. They content themselves with what we consider wholly inapplicable cases. They are as follows:

In the case of *Luria v. United States,* 231 U. S. 9, the sufficiency of a petition to cancel a naturalization certificate was not challenged and the case was heard and determined as if the issue of fraud were tendered. In the opinion rendered by the District Court, it was said, after observing that the petition was subject to criticism: "That point, however, was not raised and I suppose the defendant does not mean to raise it." Of this situation, this Court said: "This view of his attitude passed unquestioned then and it is too late to question it now."

In the case of *Duignan v. United States,* 274 U. S. 195, 200, this Court had before it an appeal from a decree of the Court of Appeals affirming a decree of the District Court forfeiting a lease for violation of the National Prohibition Act. The enumerated questions raised and presented in the Court of Appeals did not include the question of the constitutionality of the forfeiture under Section 23. This Court held that constitutional objections to the forfeiture in equity of the lease under provisions of Section 23 of the National Prohibition Act for violation of the Act by the tenant cannot be raised for the first time in the Supreme Court.

The case of *Husty v. United States,* 282 U. S. 694, 701, 702, involved the question of raising in this Court for the

first time the exclusion by the trial court of certain questions by the petitioner there seeking to establish the name and identity of an officer's informant. This Court said:

> "Petitioners ask review of these rulings on the evidence, but we do not consider them, since they were not assigned as error on the appeal to the Court of Appeals, and it does not appear that they were presented or passed upon there."

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> "We do not discuss petitioner's contentions which he failed to assign as error below."

(b) The Government argues that the defendant was not taken by surprise and protected against another prosecution for the same offense; and, therefore, it was a simple

discrepancy between the allegations and the proof and immaterial (Govt. Br. p. 6). This, to say the least, is an extreme over-simplification of the question posed. The statute, U. S. C., Title 8, Sec. 746(a) 18 makes it an offense to: "Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized. . . ." The indictment here specifically charged that on or about May 25, 1944, the Petitioner knowingly, wilfully, falsely and fraudulently represented "to J. E. Siu, a Deputy Sheriff of the County of Los Angeles, State of California, said J. E. Siu being a person having good reason to inquire into the nationality status of the defendant, that he, the defendant, was a citizen of the United States."

The Court instructed the jury [R. 273]:

> "You are instructed that under the charge in each count of this indictment that the burden is on the prosecution to establish beyond a reasonable doubt each of the following elements:
>
> 1. . . .
>
> 2. **That he made the representation to the person mentioned in the indictment.**
>
> 3. . . .
>
> 4. That the defendant willfully made such false representation.
>
> 5. . . .
>
> 6. That the person to whom such representation was made had a good reason to inquire into the nationality status of the defendant."

Each false representation of United States citizenship is itself an offense. The Petitioner would have violated the statute twice if at his interrogation at the Hill Street address he had there affirmatively claimed to be a United States citizen, or if the arrest slip that Siu made out at the Hill Street address contained the question, "Are you a citizen of the United States?" and the petitioner had answered, "Yes."

We are dealing here with a distinct substantive offense and not a continuing offense. A charge of the substantive offense that "A" murdered "B" at a certain time and place cannot be established by proof he murdered "C" at that time and place. Let us assume that the jury had acquitted the Petitioner for falsely representing himself to be a citizen of the United States to Siu, and the United States indicted him for having made false representation of United States citizenship to Hopkins. The Petitioner would be in no position to plead twice in jeopardy because they are two separate and distinct offenses. In fact, to point up the speciousness of the Government's argument that Petitioner would be protected against a second prosecution for the offense charged in Count Three, we only have to refer to the Government's so-called conditional Petition for Certiorari. The Government seeks review of Count One [R. 2] of the indictment which charged false representation of citizenship to one Cox of the Beverly Hills Police Department (Govt. Pet. No. 213, p. 8). The evidence as to that count was substantially the same as the Siu testimony [R. 82, 118]. In both instances the Petitioner's age was given, the years lived in the County, the years lived in the State and the years lived in the United States was given as life.